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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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File: WAC 08 159 52513 Office: CALIFORNIA SERVICE CENTER Date: JAN 07 2010

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office ("AAO") on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition to employ the beneficiary an L-1B intracompany transferee with specialized knowledge pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101(a)(15)(L). The petitioner, an electronics manufacturer, is an affiliate of the beneficiary's foreign employer, located in Thailand. The petitioner seeks to employ the beneficiary in the position of Electronics Test Technician for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary possesses specialized knowledge or that he has been or will be employed in a capacity involving specialized knowledge. In denying the petition, the director observed that the record consisted primarily of the unsupported assertions of the petitioner, and that such assertions were insufficient to establish the beneficiary's eligibility. The director found that the petitioner failed to identify any special or advanced body of knowledge which would distinguish the beneficiary's role from any other similarly experienced and educated electronics test technician within the petitioner's organization or within the electronics manufacturing industry.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the director disregarded the petitioner's probative evidence of the beneficiary's eligibility for L-1B classification, emphasizing that the petitioner submitted "substantial, specific written testimony and documentary evidence" in support of its claim that the beneficiary is qualified for the benefit sought. Counsel further asserts that the director "willfully applied an illegal specialized knowledge standard to the submitted petition requiring that the petitioner distinguish the beneficiary's role from that of any other similarly experienced and educated Electronics Test Technician employed by the petitioning entity." Counsel submits a detailed brief in support of the appeal.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization. The petitioner must also demonstrate that the beneficiary seeks to enter the United States temporarily in order to continue to render services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(3) further states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The primary issue in this proceeding is whether the petitioner has established that the beneficiary has been or will be employed in a specialized knowledge capacity and whether the beneficiary possesses specialized knowledge. 8 C.F.R. §§ 214.2(l)(3)(ii) and (iv).

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides:

> For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines "specialized knowledge" as:

> [S]pecial knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on May 13, 2008. In a letter dated May 9, 2008, the petitioner explained that the company had recently secured a major manufacturing contract with Cisco Systems, under which a product designed by Cisco will be manufactured at the petitioning organization's Thailand facility. The petitioner further discussed the beneficiary's proposed assignment within the scope of this contract as follows:

> The purpose of the U.S. assignment is to gain an in-depth knowledge of the various product model prototypes and to test and troubleshoot the prototypes' electronic circuit boards, in preparation of the product transfer to Thailand for manufacturing. The U.S. position requires specialized knowledge of the techniques and methodologies currently in place at [the foreign entity's] Thai facility, which will be utilized in the manufacturing program.
>
> Possession of specialized knowledge and skills is critical to this initiative. A team of highly qualified employees from [the Thai affiliate], with specialized knowledge of the manufacturing systems and programs in place at that facility, will assist in preparing for the product transfer and manufacturing program.

> [The petitioner] manufactures router and switcher subassemblies (electronic equipment used in internet broadband technology) for Cisco. However, it is the specialized knowledge of [the petitioner's] specific manufacturing processes that is required for the U.S. position. The beneficiary has the required specialized knowledge, obtained through his employment experience with [the foreign entity's] manufacturing facility in Thailand.

The petitioner further explained that all of the foreign entity's electronics test technicians receive training and certification in the petitioner's "360 degree" troubleshooting technique, which is described as "the best in class troubleshooting technique within the industry." The petitioner emphasizes that "all personnel must demonstrate successful troubleshooting results, as deemed by their supervisor, in an electronic networking troubleshooting environment for 2 years in order to remain certified." The petitioner stated that the 360 degree technique includes the following components:

1) Troubleshooting techniques in Custom Design Integrated Circuits (known as ASICs), operating principles, and schematics of different types of Integrated Circuits.
2) IXIA traffic generator operating techniques (unique testing equipment configured by [the petitioner] to test networking products, such as the routers we manufacture for Cisco).
3) Optical networking routers troubleshooting techniques proprietary to [the petitioner] which include:
    a. Eye Mask Diagram (a technique to evaluate networking traffic integrity);
    b. Extinction Testing (a technique to evaluate the sensitivity of optical networking signals);
    c. Bit Error Rate Testing (a technique to evaluate the robustness of the networking product); and
    d. CPP (a proprietary test suite designed to test networking products using Labview programming language).

The petitioner stated that "due to the complexity of the unique manufacturing systems and the broad scope of the processes to be managed and supported, prior experience is required to overcome the challenges inherent in the transfer and initialization process." The petitioner stated that the beneficiary "has knowledge and experience that cannot be easily duplicated, and which distinguishes him from his industry peers." The petitioner described the beneficiary's proposed duties as the following:

> [The beneficiary] will provide engineering technical support and coordination of prototype builds to ensure that new assemblies are completed on time and on budget. He will provide feedback to engineering and support groups to ensure a smooth transition from prototype to production. He will review and interpret customer specifications, and provide engineering expertise for all technical issues related to the customer's product from conception to obsolescence. Working closely with Cisco engineers on the design of new products, he will gather, understand and convert Cisco data into usable [company] manufacturing information to be utilized by the manufacturing engineers at [the petitioner's] Thailand facility. He will verify that specifications conform to [the petitioner's], Cisco's and industry standards. Based on his specialized knowledge of [company-specific] manufacturing systems, he will assist in selecting and programming manufacturing equipment to build the product and will assist manufacturing

> with the first run of the product. [The beneficiary] will develop specialized tools to automate and ease assembly and test development. He will develop and execute assembly and test strategies for new products, including DFx analysis and feedback. He will support the transition of Cisco's products to [the petitioner's] manufacturing to ensure successful handoffs.
>
> [The beneficiary] will apply his specialized knowledge of [the petitioner's] test and manufacturing methodologies in the prototype and transfer stages of the manufacturing contract program and upon completion of the product transfer, he will return to Thailand to implement program details and assist in the production program at [the foreign entity].

The petitioner indicated that the beneficiary has been employed as an electronics test technician with the foreign entity since July 2002 and is responsible for "supporting the production of electronics data communication systems by ensuring that all failed circuit boards are debugged and repaired," as well as supporting test engineers in addressing root failure causes, and setting up debug procedures for team members to resolve circuit board failures in the product being manufactured at the facility. The petitioner stated that the beneficiary's current duties also include the following:

> [The beneficiary] provides technical expertise on assigned materials for production or customer-identified material problems. He performs assessments and risk analyses, as well as quality audits on potential suppliers. He generates product specifications and provides them to the supplier, and performs material qualification on prototype and sample material. He serves as the program/project interface to coordinate new product launches and introductions. He translates customer requirements into factory activities, provides factory activity time estimates for pricing models, documents associated factory support activities, and develops preliminary program timelines for the customer quote.
>
> [The beneficiary] has gained specialized knowledge of [the petitioner's] unique test processes and systems, both global and local to Thailand, many of which are proprietary to [the petitioning organization]. He is fluent in the IT systems and manufacturing systems utilized at [the foreign entity]. His specialized knowledge and experience are indispensable to the U.S. position and to the successful completion of the contract manufacturing project. His background and experience make him uniquely qualified for the U.S. project and he was selected for this assignment based on that specialized knowledge and experience.

The petitioner concluded by stating that the beneficiary has "obtained a body of highly specialized knowledge of [company-specific] systems, technologies and processes, and has mastered [the petitioner's] proscribed [*sic*] methods." The petitioner emphasized that the beneficiary's "knowledge of the petitioner's electronic test systems, including the '360 degree' technique, qualifies him for the U.S. position," considering that "he has been applying [the petitioner's] unique troubleshooting techniques to Cisco products, including their circuit board components, for years at the Thai facility."

In support of the petition, the petitioner submitted an overview of the company's services excerpted from the petitioner's web site, as well as a July 2007 press release regarding a four-year manufacturing contract awarded by Cisco systems to the petitioner for current and future sub-assemblies for Cisco products.

On May 21, 2008, the director issued a request for additional evidence (RFE), in which he instructed the petitioner to submit the following documentation to establish that the beneficiary possesses specialized knowledge: (1) an explanation regarding how the beneficiary's current and proposed duties are special, advanced or otherwise different from those of other workers employed by the petitioner or other U.S. employers in the same type of position, supported by probative evidence; (2) an explanation regarding how the beneficiary's training or experience is uncommon, noteworthy, or distinguished by some unusual quality and not generally known by practitioner's in the alien's field in comparison to that of others employed by the petitioner in this field, supported by probative evidence; (3) information regarding the number of foreign national employees working at the U.S. location where the beneficiary will be assigned, including their job titles and visa status; and (4) information regarding the number of persons holding the same or similar position at the U.S. location where the beneficiary will be employed. The director emphasized that the petitioner "is required to submit probative evidence to corroborate the statements made in its initial filing," and advised that USCIS is required to make comparisons not only between the beneficiary and the general labor market, but also between the beneficiary and the remainder of the petitioner's workforce.

In response to the RFE, counsel for the petitioner asserted that the director erroneously stated the L-1B standard by suggesting that "specialized knowledge may not be appropriate if U.S. workers employed by the petitioner are qualified to do the work required of the petition beneficiary," and implying that specialized knowledge positions must be narrowly held within the petitioner's organization. Counsel stated that such a standard is "clearly contrary to long standing USCIS policy and regulatory history," and cited to two legacy Immigration and Naturalization Service (INS) memoranda in support of his assertions. [1] Counsel asserted that "under current U.S. immigration laws. . . the petitioner need not establish that the beneficiary possesses specialized knowledge above that held by those similarly employed in the foreign organization. Rather the beneficiary must show specialized knowledge that is distinguishable from the generalized skill or level of expertise required to work in the occupational category of the proffered position."

Counsel asserted that the beneficiary would meet either standard for L-1B classification, as it has been shown that his duties and skills can be distinguished from those of the petitioner's U.S. workforce, but implored the director to adjudicate the case in accord with the Puleo and Ohata policy memoranda.

The petitioner also submitted a letter dated June 26, 2008, in which it specifically addressed the requests raised by the director in the RFE. The petitioner emphasized that the fundamental reason for the beneficiary's transfer is due to the need for technicians "with advanced, [company]-specific knowledge of test techniques used at the Thai manufacturing facility." The petitioner explained that Cisco's design and prototype facility and the petitioner's Thai manufacturing facility work together on product development and mass scale manufacturing for a single product.

The petitioner explained that even if U.S.-based test technicians were available for the proposed assignment, they would not be qualified for the assignment unless they were first transferred to Thailand to become familiarized with the petitioner's manufacturing facility there, and then transferred back to the United States. The petitioner

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[1] *See* Memorandum from James A. Puleo, Assoc. Comm., INS, *Interpretation of Special Knowledge*, March 4, 1994. (hereinafter "Puleo memorandum"); Memorandum of Fuji O. Ohata, Assoc. Comm., INS, *Interpretation of Specialized Knowledge*, December 20, 2002 (hereinafter "Ohata memorandum.")

emphasized that its facilities located in different countries work on a single product, and that personnel transfers are required to ensure integrated, successful operations.

The petitioner noted that the Thailand facility has over 7,000 employees and that "in order to ensure that all of the employees who are going to be involved in the Cisco manufacturing program have the requisite product knowledge, certain specialized knowledge team members have come to the U.S. to have direct access to the product prototype and to interface directly with the customer's product design engineers for a short time." The petitioner explained that these employees then transfer their knowledge to other team members upon their return to the manufacturing facility.

The petitioner indicated that it employs 117 test technicians in the United States, and a total of 15 at the Cisco facility where the beneficiary will work, but noted that "none of these technicians perform the exact duties as those stated in the beneficiary's proposed position." The petitioner emphasized that the beneficiary's duties are different from those of other similarly employed U.S. workers because "they require specialized knowledge of the techniques and methodologies currently in place at [the petitioner's] Thai facility."

In response to the director's request that the petitioner describe any special or advanced duties performed by the beneficiary, the petitioner stated:

> The beneficiary's training and experience were described in detail in the supporting letter submitted with the petition; however, in response to the RFE, we note that the beneficiary's training and experience is uncommon, noteworthy, and distinguished by an unusual quality and not generally known by practitioners in this particular field, in that he has undergone [company-specific] training and has [company-specific] experience in how to test and troubleshoot Cisco products in conformance with [the petitioner's] guidelines and standards.

The petitioner once again outlined its "360 degree" troubleshooting technique, noting that "this is an extremely comprehensive, in-depth electronics testing and troubleshooting technique, involving not only a unique training methodology but also a specific philosophy or mentality that is applied by [the petitioner's] test technicians to their product failure analyses." The petitioner emphasized that the technique involves a more permanent result compared to "superficial inspection and repair," and "produces a better, more robust and longer-lasting product for [the petitioner's] customers." The petitioner stated that it considers the technique to be "a significant competitive advantage in the industry." The petitioner further described the beneficiary's specialized or advanced duties as follows:

> As an Electronics Test Technician at [the petitioner's] manufacturing facility in Thailand, the beneficiary has highly specific training, knowledge and experience that cannot be easily duplicated, and which distinguishes him from his industry peers. Additionally, since the beneficiary's work at [the foreign entity] has been devoted exclusively to providing . . . proprietary electronic testing services on Cisco products (other technicians within the company service other [company's] customers), his knowledge and experience are uniquely suited to the proposed duties in the United States.

> [The petitioner] has established focus teams: teams of employees who work exclusively on products for specific customers. The beneficiary works as part of a service team organization in the Failure Analysis Laboratory focusing on Cisco products, including their router and switch subassemblies. Over the last several years, he has mastered [the petitioner's] unique test processes and failure analysis techniques, including the proprietary "360 degree" troubleshooting technique, and has demonstrated ability in troubleshooting networking products for Cisco in accordance with [the petitioner's] proscribed [*sic*] methods.

The director denied the petition on July 15, 2008, concluding, that the petitioner failed to establish that the beneficiary possesses specialized knowledge or that he has been and would be employed in a capacity that requires specialized knowledge. In denying the petition, the director observed that the petitioner provided no evidence in support of its assertions regarding the beneficiary's advanced and specialized knowledge. The director acknowledged the petitioner's reliance on the Puleo and Ohata memoranda, but emphasized that both memoranda require submission of probative evidence to support a finding that the beneficiary's knowledge is either specialized within the industry or advanced among members of the petitioner's own workforce.

The director found that the petitioner had not established how the beneficiary's training, experience and job duties are materially different from those of other electronics test technicians employed by the petitioning organization or in the industry at large. The director concluded that "without producing probative evidence, the petitioner cannot establish that the beneficiary's knowledge is noteworthy, uncommon or distinguished by some unusual quality."

On appeal, counsel asserts that the petitioner "submitted substantial, specific written testimony and documentary evidence providing that [the beneficiary], more likely than not, is eligible for L-1B classification. Counsel asserts that the director disregarded such evidence "apparently based on a misstatement of case law addressing evidentiary standards." Counsel asserts that the director erroneously relied upon *Matter of Ramirez*, *Matter of Obaigbena*, and *Matter of Laureano*, matters which all pertain to the unsupported assertions of counsel, as a basis for rejecting the petitioner's statements. Counsel requests that the AAO "affirm the long-standing proposition that specific detailed written testimony qualifies as evidence."

Counsel further contends that the director "applied an illegal specialized knowledge standard to the submitted petition, requiring that petitioner distinguish the beneficiary's role from that of any other similarly experienced and educated Electronics Test Technician employed by the petitioning entity." Counsel cites to an unpublished 1993 AAO decision to stand for the proposition that "the beneficiary must show specialized knowledge that is distinguishable from the generalized skill or expertise required to work in the occupational category of the proffered position." Counsel asserts that there is no requirement that the petitioner establish that the beneficiary possesses specialized knowledge above that held by those similarly employed in the foreign organization. Counsel discusses the legislative history of the regulatory definition of "specialized knowledge," noting that Congress specially rejected requirements that knowledge be unique or narrowly held in the organization when it finalized the 1987 definition, and further liberalized the definition in 1990. Counsel emphasizes that the petitioner enclosed in its response to the RFE copies of the Ohata and Puleo memoranda, which specifically state specialized knowledge does not require that the advanced knowledge be narrowly held throughout the company. Counsel suggests that the director willfully applied the incorrect specialized knowledge standard to the facts of the case.

In addition, counsel objects to the director's citation to *Matter of Colley* and *Matter of Penner*, in the notice of decision, asserting that these are "opinions that were deemed inapplicable by the Congressionally established statutory definition of specialized knowledge in 1990." Counsel asserts that the director's disregard for longstanding Federal immigration interpretations, the regulatory history, and the Federal statute established by Congress is illegal since it seeks to establish a new substantive definition of specialized knowledge without going through the notice and comment rule making procedures required by the Administrative Procedure Act.

Counsel concludes by stating:

> [The beneficiary's] specialized knowledge of [the petitioner's] specific testing techniques, in particular the '360 degree' technique, is valuable to [the petitioner's] competitiveness in the marketplace. The "360 degree" technique is specific to [the foreign entity's] Thailand facility and [the beneficiary's] knowledge of that technique thus contributes to the U.S. company's knowledge of foreign company operating conditions and methods. [The beneficiary] has extensive and significant experience with [the foreign entity]. He has completed many years of assignments implementing the "360 degree" technique and has thus enhanced the competitiveness of [the petitioner] with respect to the Cisco relationship since he has worked for most of those years on Cisco projects being manufactured in Thailand. [The beneficiary's] knowledge of the [company-specific] techniques can be gained only through prior experience with [the petitioner] and, as demonstrated in the previously submitted materials, such knowledge cannot easily be transferred or taught to another individual.

The Standard for Specialized Knowledge

In determining what constitutes specialized knowledge, the standards by which the AAO is bound are those set forth in the statutory definition of specialized knowledge itself, as provided at section 214(c)(2)(B) of the Act, USCIS regulations, and applicable precedent decisions. When a statute is ambiguous, Congress has left a gap for the agency to fill. *See Chevron USA Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984). This is the situation here. In interpreting section 214(c)(2)(B), the AAO must rely on existing USCIS regulations, the applicable precedent decisions, and the legislative history of the enabling and declaratory statutes, as an indication of Congressional intent.

Looking to the language of the statutory definition, Congress has provided USCIS with an ambiguous definition of specialized knowledge. In this regard, one Federal district court explained the infeasibility of applying a bright-line test to define what constitutes specialized knowledge:

> This ambiguity is not merely the result of an unfortunate choice of dictionaries. It reflects the relativistic nature of the concept special. An item is special only in the sense that it is not ordinary; to define special one must first define what is ordinary. . . . There is no logical or principled way to determine which baseline of ordinary knowledge is a more appropriate reading of the statute, and there are countless other baselines which are equally plausible. Simply put, specialized knowledge is a relative and empty idea which cannot have a plain meaning. *Cf.* Westen, *The Empty Idea of Equality*, 95 Harv.L.Rev. 537 (1982).

1756, Inc. v. Attorney General, 745 F.Supp. 9, 14-15 (D.D.C., 1990).[2]

While Congress did not provide explicit guidance for what should be considered ordinary knowledge, the principles of statutory interpretation provide some clue as to the intended scope of the L-1B specialized knowledge category. *NLRB v. United Food & Commercial Workers Union, Local 23,* 484 U.S. 112, 123 (1987) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987)).

First, the AAO must look to the language of section 214(c)(2)(B) itself, that is, the terms "special" and "advanced." Like the courts, the AAO customarily turns to dictionaries for help in determining whether a word in a statute has a plain or common meaning. *See, e.g., In re A.H. Robins Co.*, 109 F.3d 965, 967-68 (4th Cir. 1997) (using *Webster's Dictionary* for "therefore"). According to *Webster's New College Dictionary*, the word "special" is commonly found to mean "surpassing the usual" or "exceptional." *Webster's New College Dictionary*, 1084 (3rd Ed. 2008). The dictionary defines the word "advanced" as "highly developed or complex" or "at a higher level than others." *Id.* at 17.

Second, looking at the term's placement within the text of section 101(a)(15)(L) of the Act, the AAO notes that specialized knowledge is used to describe the nature of a person's employment and that the term is listed among the higher levels of the employment hierarchy together with "managerial" and "executive" employees. Based on the context of the term within the statute, the AAO therefore would expect a specialized knowledge employee to occupy an elevated position within a company that rises above that of an ordinary or average employee. *See 1756, Inc. v. Attorney General*, 745 F.Supp. at 14.

Third, a review of the legislative history for both the original 1970 statute and the subsequent 1990 statute indicates that Congress intended for USCIS to closely administer the L-1B category. Specifically, the original drafters of section 101(a)(15)(L) of the Act intended that the class of persons eligible for the L-1 classification would be "narrowly drawn" and "carefully regulated and monitored" by USCIS. *See generally* H.R. Rep. No. 91-851 (1970), reprinted in 1970 U.S.C.C.A.N. 2750, 2754, 1970 WL 5815. The legislative history of the 1970 Act plainly states that "the number of temporary admissions under the proposed 'L' category will not be large." *Id.* In addition, the Congressional record specifically states that the L-1 category was intended for "key personnel." *See generally, id.* The term "key personnel" denotes a position within the petitioning company that is "[o]f crucial importance." *Webster's New College Dictionary* 620 (3rd ed., Houghton Mifflin Harcourt Publishing Co. 2008). Moreover, during the course of the sub-committee hearings on the bill, the Chairman specifically questioned witnesses on the level of skill necessary to qualify under the proposed "L" category. In response to the Chairman's questions, various witnesses responded that they understood the legislation would allow "high-level people," "experts," individuals with "unique" skills, and that it would not include "lower categories" of workers or "skilled craft workers." *See* H.R. Subcomm. No. 1 of the Jud. Comm., Immigration Act of 1970: Hearings on H.R. 445, 91st Cong. 210, 218, 223, 240, 248 (Nov. 12, 1969).

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[2] Although *1756, Inc. v. Attorney General* was decided prior to enactment of the statutory definition of specialized knowledge by the Immigration Act of 1990, the court's discussion of the ambiguity in the legacy Immigration and Naturalization Service (INS) definition is equally illuminating when applied to the definition created by Congress.

Neither in 1970 nor in 1990 did Congress provide a controlling, unambiguous definition of "specialized knowledge," and a narrow interpretation is consistent with so much of the legislative intent as it is possible to determine. H. Rep. No. 91-851 at 6, 1970 U.S.C.C.A.N. at 2754. This interpretation is consistent with legislative history, which has been largely supportive of a narrow reading of the definition of specialized knowledge and the L-1 visa classification in general. *See 1756, Inc. v. Attorney General*, 745 F.Supp. at 15-16; *Boi Na Braza Atlanta, LLC v. Upchurch*, Not Reported in F.Supp.2d, 2005 WL 2372846 at *4 (N.D.Tex., 2005), *aff'd* 194 Fed.Appx. 248 (5th Cir. 2006); *Fibermaster, Ltd. v. I.N.S.*, Not Reported in F.Supp., 1990 WL 99327 (D.D.C., 1990); *Delta Airlines, Inc. v. Dept. of Justice*, Civ. Action 00-2977-LFO (D.D.C. April 6, 2001)(on file with AAO).

Further, although the Immigration Act of 1990 provided a statutory definition of the term "specialized knowledge" in section 214(c)(2) of the Act, the definition did not generally expand the class of persons eligible for L-1B specialized knowledge visas. Pub.L. No. 101-649, § 206(b)(2), 104 Stat. 4978, 5023 (1990). Instead, the legislative history indicates that Congress created the statutory definition of specialized knowledge for the express purpose of clarifying a previously undefined term from the Immigration Act of 1970. H.R. Rep. 101-723(I) (1990), reprinted in 1990 U.S.C.C.A.N. 6710, 6749, 1990 WL 200418 ("One area within the L visa that requires more specificity relates to the term 'specialized knowledge.' Varying interpretations by INS have exacerbated the problem."). While the 1990 Act declined to codify the "proprietary knowledge" and "United States labor market" references that had existed in the previous agency definition found at 8 C.F.R. § 214.2(l)(1)(ii)(D) (1988), there is no indication that Congress intended to liberalize its own 1970 definition of the L-1 visa classification.

Although counsel objects to the director's reliance on any law or legislative history that pre-dates the 1990 Act and the statutory definition of specialized knowledge, counsel has not pointed to any committee report or floor statements that undermine the statement of the original enacting Committee that admissions "will not be large" and that the category will be "carefully regulated and monitored" by USCIS. Instead, counsel consistently attributes to the 1990 Act, without citing any specific legislative history, a blanket intent to "broaden" the definition of specialized knowledge. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The Committee Report relating to the 1990 Act does state that Congress intended to "broaden" the L-1 category in general by making four specifically enumerated changes: allowing accounting firms to participate in the program, incorporating the "blanket petition" program into the statute, changing the overseas employment requirement to one year within the three years prior to admission, and enlarging the period of admission for managers and executives to seven years. H.R. Rep. 101-723(I), 1990 U.S.C.C.A.N. at 6749. This portion of the report, however, made no mention of any intent to broaden the specialized knowledge visa classification.

In a separate paragraph that was not enumerated as one of the four changes, the Committee Report discussed the new specialized knowledge definition. The paragraph begins by stating: "One area within the L visa that requires more specificity relates to the term 'specialized knowledge.' Varying interpretations by INS have exacerbated the problem." Given that the term was previously undefined by Congress, it is clear that the first sentence of the paragraph attributes the previous confusion as to what constituted specialized knowledge to

the failure of the 1970 Act to define the term. The second sentence of the paragraph, in turn, simply notes that the "varying interpretations" adopted by the INS through the regulations, precedent decisions, and memoranda had contributed to the confusion over the applicable definition. There is no indication in the Committee Report that Congress otherwise intended the new definition to be considered as part of the enumerated changes that specifically "broadened" the L-1 category. Instead, the paragraph is conspicuously neutral.

The AAO notes that the Committee Report does not take issue with the specifics of the previous INS interpretations and does not state an intent to "broaden" the "narrow class" of aliens that Congress initially stated would be eligible for the classification. The 1990 Committee Report does not reject, criticize, or even refer to any specific INS regulation or precedent decision interpreting the term. The report simply states that the Committee was recommending a statutory definition because of "[v]arying interpretations by INS." H.R. Rep. No. 101-723(I), at 69, 1990 U.S.C.C.A.N. at 6749. Beyond that statement, the Committee Report simply restates the tautology that became the statutory definition of specialized knowledge. There is nothing in the legislative history to indicate that Congress intended to specifically liberalize or broaden the specialized knowledge classification, other than the narrow changes made by the statute itself: the deletion of the "proprietary knowledge" and "United States labor market" references that had existed in the agency definition.

Moreover, the AAO notes that the precedent decisions that predate the 1990 Act are not categorically superseded by the statutory definition of specialized knowledge. The AAO generally presumes that Congress is knowledgeable about existing law pertinent to the legislation it enacts. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). Indeed, the Ninth Circuit Court of Appeals recently concluded that the AAO's reliance on such authority was appropriate. *Brazil Quality Stones v. Chertoff*, --- F.3d ---, 2008 WL 2675825 n.10 at *4 (9th Cir., July 10, 2008).

Although the cited precedents pre-date the current 1990 Act, the AAO finds them instructive. While the underlying definitions of specialized knowledge that were discussed in the decisions are now superseded by the statutory definition, the general issues and the case facts themselves remain cogent as examples of how the INS applied the law to the real world facts of individual adjudications. For example, USCIS must distinguish between skilled workers and specialized knowledge workers when making a determination on an L-1B visa petition. The distinction between skilled and specialized knowledge workers has been a recurring issue in the L-1B program and is discussed at length in the INS precedent decisions, including *Matter of Penner*. *See* 18 I&N Dec. at 50-53 (discussing the legislative history and prior precedents as they relate to the distinction between skilled and specialized knowledge workers).

Accordingly, the director's citation of precedents that predate the Immigration Act of 1990 is not objectionable, as long as the director's decision is narrowly tailored to address issues that were not directly superseded by the statutory definition. If the director were to apply the precedent decisions in support of a "proprietary knowledge" requirement or a reference to "knowledge not available on the U.S. labor market," then the use of the precedents would be objectionable. The director, however, did not do so in this case.

If any conclusion can be drawn from the enactment of the statutory definition of specialized knowledge in section 214(c)(2)(B), it would be based on the nature of the Congressional clarification itself. By not including any strict criterion in the ultimate statutory definition and further emphasizing the relativistic aspect of "special knowledge," Congress created a standard that requires USCIS to make a factual determination that can only be determined on a case-by-case basis, based on the agency's expertise and discretion. Rather than a bright-line standard that would support a more rigid application of the law, Congress gave the INS a more flexible standard that requires an adjudication based on the facts and circumstances of each individual case. *Cf. Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 377 (3d Cir. 2003) (quoting *Baires v. INS*, 856 F.2d 89, 91 (9th Cir. 1988)).

To determine what is special or advanced, USCIS must first determine the baseline of ordinary. As a baseline, the terms "special" or "advanced" must mean more than simply "skilled" or "experienced." By itself, work experience and knowledge of a firm's technically complex products will not equal "special knowledge." *See Matter of Penner*, 18 I&N Dec. 49, 53 (Comm. 1982). In general, all employees can reasonably be considered "important" to a petitioner's enterprise. If an employee did not contribute to the overall economic success of an enterprise, there would be no rational economic reason to employ that person. An employee of "crucial importance" or "key personnel" must rise above the level of the petitioner's average employee. In other words, specialized knowledge generally requires more than a short period of experience; otherwise special or advanced knowledge would include every employee in an organization with the exception of trainees and entry-level staff. If everyone in an organization is specialized, then no one can be considered truly specialized. Such an interpretation strips the statutory language of any efficacy and cannot have been what Congress intended.

Considering the definition of specialized knowledge, it is the petitioner's, not USCIS's, burden to articulate and prove that the beneficiary possesses "special" or "advanced" knowledge. Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B). USCIS cannot make a factual determination regarding the beneficiary's specialized knowledge if the petitioner does not, at a minimum, articulate with specificity the nature of the claimed specialized knowledge, describe how such knowledge is typically gained within the organization, and explain how and when the beneficiary gained such knowledge.

Once the petitioner articulates the nature of the claimed specialized knowledge, it is the weight and type of evidence which establishes whether or not the beneficiary actually possesses specialized knowledge. A petitioner's assertion that the beneficiary possesses advanced knowledge of the processes and procedures of the company must be supported by evidence describing and distinguishing that knowledge from the elementary or basic knowledge possessed by others. Because "special" and "advanced" are comparative terms, the petitioner should provide evidence that allows USCIS to assess the beneficiary's knowledge relative to others in the petitioner's workforce or relative to similarly employed workers in the petitioner's specific industry.

Analysis

In examining the specialized knowledge of the beneficiary, the AAO will look to the petitioner's description of the job duties and the weight of the evidence supporting any asserted specialized knowledge. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner must submit a detailed job description of the services to be performed sufficient to

establish specialized knowledge. *Id.*

Upon review, the petitioner in this case has failed to establish either that the beneficiary's position in the United States or abroad requires an employee with specialized knowledge or that the beneficiary has specialized knowledge. The beneficiary's current and proposed job duties appear to be typical of an electronics test technician working in the manufacturing sector. Counsel and the petitioner assert, however, that some positions require company-specific knowledge that the beneficiary gained in Thailand, as well as experience with the petitioner's processes and procedures, and therefore could not be performed by the typical skilled worker.

Therefore, the first question before the AAO is whether the beneficiary's knowledge of and experience with the petitioner's proprietary tools, processes and methodologies alone constitutes specialized knowledge. While the current statutory and regulatory definitions of "specialized knowledge" do not include a requirement that the beneficiary's knowledge be proprietary, the petitioner cannot satisfy the current standard merely by establishing that the beneficiary's purported specialized knowledge is proprietary. The knowledge must still be either "special" or "advanced." As discussed above, the elimination of the bright-line "proprietary" standard did not, in fact, significantly liberalize the standards for the L-1B visa classification.

Reviewing the precedent decisions that preceded the Immigration Act of 1990, there are a number of conclusions that were not based on the superseded regulatory definition, and therefore continue to apply to the adjudication of L-1B specialized knowledge petitions. In 1981, the INS recognized that "[t]he modern workplace requires a high proportion of technicians and specialists." The agency concluded that:

> Most employees today are specialists and have been trained and given specialized knowledge. However, in view of the [legislative history], it can not be concluded that all employees with specialized knowledge or performing highly technical duties are eligible for classification as intracompany transferees. The House Report indicates the employee must be a "key" person and associates this employee with "managerial personnel."

Matter of Colley, 18 I&N Dec. at 119-20.

In a subsequent decision, the INS looked to the legislative history of the 1970 Act and concluded that a "broad definition which would include skilled workers and technicians was not discussed, thus the limited legislative history available therefore indicates that an expansive reading of the 'specialized knowledge' provision is not warranted." *Matter of Penner*, 18 I&N Dec. at 51. The decision continued:

> [I]n view of the House Report, it cannot be concluded that all employees with any level of specialized knowledge or performing highly technical duties are eligible for classification as intra-company transferees. Such a conclusion would permit extremely large numbers of persons to qualify for the "L-1" visa. The House Report indicates that the employee must be a "key" person and "the numbers will not be large."

Id. at 53.

According to the reasoning of *Matter of Penner*, work experience and knowledge of a firm's technically complex products, by itself, will not equal "special knowledge." USCIS must interpret specialized knowledge to require more than fundamental job skills or a short period of experience. An expansive interpretation of specialized knowledge in which any experienced employee would qualify as having special or advanced knowledge would be untenable, since it would allow a petitioner to transfer any experienced employee to the United States in the L-1B classification.

The proprietary specialized knowledge in this matter is stated to include the proprietary "360 degree" troubleshooting technique, and the "unique manufacturing systems and programs" currently in place at the petitioner's Thailand facility. The petitioner emphasizes that the "360 degree" technique is the "best in class troubleshooting technique within the industry." However, all technology manufacturing firms develop internal tools, methodologies, procedures and best practices for ensuring the quality and functionality of manufactured products. Other than stating that its troubleshooting technique is "best in class," the petitioner did not attempt to explain how its troubleshooting techniques differ from those implemented by other firms who manufacture electronics components. The petitioner indicates that all Failure Analysis and Electronics Technicians receive training and certification in the 360 degree technique, but it has neither documented nor specified the amount or type of training involved in the certification process. The petitioner indicates that a technician must "demonstrate successful troubleshooting results" for two years in order to *remain* certified, but the record contains no information regarding the length of the initial training and certification process. Therefore, it cannot be concluded that the processes involved are particularly complex or different compared to those utilized by other companies in the industry, or that it would take a significant amount of time to train an electronics test technician who had no prior experience with the petitioner's family of companies. Moreover, the petitioner has not submitted evidence that the instant beneficiary completed the training and remains certified in the process, nor has it explained how the 360 degree process would be utilized in the U.S. position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner vaguely refers to the "complexity of the unique manufacturing systems" and "broad scope of the processes to be managed and supported" as a basis for requiring the services of an electronics test technician who possesses prior experience with the Thai entity. However, the petitioner has not elaborated upon what makes the foreign entity's manufacturing systems "unique" or what specific processes are managed or supported. The petitioner appears to be one of many manufacturers that contract with Cisco to provide electronics components, so it is reasonable to believe that Cisco requires some degree of standardization in production across different contracted manufacturers. The petitioner has not identified the specific Cisco product or products to be manufactured in Thailand or indicated whether such products are manufactured by any other contractors. For all of these reasons, the petitioner has not established that knowledge of the "360 degree" troubleshooting technique and the company's vaguely defined manufacturing processes alone constitutes specialized knowledge. The petitioner does not articulate or document how specialized knowledge is typically gained within the organization, or explain how and when the beneficiary gained such knowledge.

All employees can be said to possess unique skill or experience to some degree. Moreover, the proprietary qualities of the petitioner's process or product do not establish that any knowledge of this process is "specialized." Rather, the petitioner must establish that qualities of the unique process or product require this

employee to have knowledge beyond what is common in the industry. This has not been established in this matter.

It is appropriate for USCIS to look beyond the stated job duties and consider the importance of the beneficiary's knowledge of the business's product or service, management operations, or decision-making process. *Matter of Colley*, 18 I&N Dec. at 120 (citing *Matter of Raulin*, 13 I&N Dec. at 618 and *Matter of LeBlanc*, 13 I&N Dec. at 816). As stated by the Commissioner in *Matter of Penner*, when considering whether the beneficiaries possessed specialized knowledge, "the *LeBlanc* and *Raulin* decisions did not find that the occupations inherently qualified the beneficiaries for the classifications sought." 18 I&N Dec. at 52. Rather, the beneficiaries were considered to have unusual duties, skills, or knowledge beyond that of a skilled worker. *Id.*

The AAO acknowledges that the specialized knowledge need not be narrowly held within the organization in order to be considered "advanced." However, it is equally true to state that knowledge will not be considered "special" or "advanced" if it is universally or even widely held throughout a company. If all similarly employed workers within the petitioner's organization receive essentially the same training, then mere possession of knowledge of the petitioner's processes and methodologies does not rise to the level of specialized knowledge. The L-1B visa category was not created in order to allow the transfer of all employees with any degree of knowledge of a company's processes. If all employees are deemed to possess "special" or "advanced" knowledge, then that knowledge would necessarily be ordinary and commonplace.

The petitioner has not successfully demonstrated that the beneficiary's knowledge of the company's products gained during his employment with the foreign entity is advanced compared to other similarly employed workers within the organization. Counsel emphasizes that the U.S. company employs few electronics test technicians at the intended worksite. However, the fact that the beneficiary would be one of few technicians assigned to the United States in relation to the specific Cisco contract is not sufficient to establish that his knowledge is specialized or advanced. There is no explanation as to why the beneficiary was chosen for the U.S.-based position over other technicians from the Thai facility and the AAO cannot assume that it was because he is deemed to have advanced knowledge of the company's policies and procedures. The petitioner indicates that all electronics test technicians employed by the foreign facility are trained and certified in the 360 degree troubleshooting technique, so completion of such training would not be considered advanced knowledge within the organization.

The petitioner indicates that its technicians are specialized by client, and that not all of them have experience in testing and manufacturing components for Cisco products. Given this scenario, it appears that any electronics technician employed by the petitioner's group of companies would be deemed to have specialized knowledge, because they would all have "narrowly tailored" knowledge that is relatively rare within the company. This interpretation of "specialized knowledge" is untenable as it would essentially allow the petitioner to utilize the L-1B classification for virtually any employee who had one year of experience. Rather, the petitioner must establish that qualities of the particular process or product require an individual to have knowledge beyond what is common among its workforce, or to establish that the beneficiary has advanced knowledge of the product. This has not been established in this matter. The fact that other workers may not have the same level of experience with a particular product is not enough to equate to special or advanced knowledge if the gap could be closed by the petitioner by simply revealing the information to a

similarly trained or experienced employee who has worked on a similar product. While the AAO acknowledges that there will be exceptions based on the facts of individual cases, an argument that an alien is unique among a small subset of workers, will not be deemed facially persuasive if a petitioner's definition of specialized knowledge is so broad that it would include the majority of its workforce.

The AAO does not doubt that the beneficiary is a valuable employee who is capable of performing the work described, nor does it doubt that the work is important to the petitioner's manufacturing efforts. As discussed above, beneficiaries of L-1B petitions should be more than merely skilled, but rather must be shown to carry out key processes or functions. Based on the context of the term "specialized knowledge" within the statute, the AAO therefore would expect a specialized knowledge employee to occupy an elevated position within a company that rises above that of an ordinary or average employee. *See 1756, Inc. v. Attorney General*, 745 F.Supp. at 14.

In this case, the petitioner has only established that the beneficiary is an experienced employee who fills a position the petitioner considers important. However, the beneficiary has been and will be working as a technician. While it is the beneficiary's actual job duties and not his job title that determine whether he possesses specialized knowledge, it is evident that as one of many technicians working for the foreign entity in the manufacturing field, he does not play a leading role in product and process development activities. Rather, it is likely that he works under the direction of electronics engineers and supervisors and follows standard procedures in performing his job duties. The petitioner has not established that the beneficiary performs unusual duties or that he is employed primarily to carry out a key process or function. *See Matter of Penner*, 18 I&N Dec. at 52.

Therefore, the claim that the petitioner does not employ electronics technicians with exactly the same experience as the beneficiary at the intended U.S. worksite who could readily perform the intended duties does not automatically lead to a conclusion that the instant beneficiary must possess specialized or advanced knowledge. Contrary to counsel's assertions on appeal, the petitioner did not distinguish the beneficiary in terms of his training and experience.

The legislative history for the term "specialized knowledge" provides ample support for a restrictive interpretation of the term. In the present matter, the petitioner has not demonstrated that the beneficiary should be considered a member of the "narrowly drawn" class of individuals possessing specialized knowledge. *See 1756, Inc. v. Attorney General, supra* at 16. The record does not establish that the beneficiary has specialized knowledge or that the position offered with the United States entity requires specialized knowledge.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.